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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter Of	)	
	)	
Bell Operating Company	)	CC Docket No. 96-21
Provision Of Out-Of-Region	)	
Interstate, Interexchange Services	)	

NYNEX COMMENTS

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SUMMARY OF NYNEX COMMENTS

NYNEX commends the Commission for acting quickly in this proceeding to enable the long distance affiliates of the former BOCs to enter certain domestic, interstate, interexchange markets pursuant to the same separation conditions applied to other LEC-affiliated carriers. Specifically, the NPRM properly proposes to classify BOC out-of-region services as "nondominant" when provided by affiliates separated from the BOC's local telephone companies. This classification will serve the public interest by freeing such affiliates from regulatory requirements which are not applied to any incumbent carrier and which, if applied, would severely inhibit the affiliate's ability to compete effectively.

The application of these criteria, and the associated cost accounting treatment, have proven sufficient to protect against any feared competitive abuses, even when applied to the in-region services of SPRINT, SNET, Rochester Telephone and others. They are clearly sufficient here. Indeed, the Commission has properly promised to review the continued need for such conditions shortly. For now, adoption of the tentative conclusions of the NPRM will serve as an excellent first regulatory step towards permitting BOC affiliates to enter out-of-region long distance markets quickly.

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NYNEX COMMENTS

I. INTRODUCTION

NYNEX Corporation ("NYNEX") hereby submits its Comments in response to the Notice of Proposed Rulemaking ("NPRM") released February 14, 1996 in this proceeding. By issuing the NPRM just seven days after the enactment of the Telecommunications Act of 1996, the Commission has moved quickly to enable the affiliates of Bell Operating Companies ("BOC") to provide "out-of-region" interstate, interexchange services on a basis identical to that authorized for the long distance services of other local exchange carriers ("LECs").[1] Specifically, the NPRM proposes to classify BOC-affiliated long distance companies as "non-dominant" in the provision of interstate, interexchange services in domestic markets[2] when provided through an affiliate subject to the separation conditions

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[1] Consistent with the NPRM, NYNEX uses the definitions set forth in the 1996 Act.

[2] Domestic markets include calls between points within the continental United States, as well as Hawaii, Puerto Rico, U.S. Virgin Islands, Guam and other U.S. offshore points.. In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and

historically set forth in the Competitive Carrier proceeding.[3] It has already been argued by some that the separation conditions being considered should not be imposed upon out-of-region services because they exceed the requirements of the 1996 Act. The Commission has properly said, however, that it will consider such arguments as it proceeds to implement the 1996 Act.[4] NYNEX believes that the application to the BOCs of the same rules applied to other LECs in Competitive Carrier, including cost accounting provisions, provide an excellent first regulatory step that the Commission can take promptly to enable BOC entry into the long distance service markets.

NYNEX urges an expeditious adoption of the NPRM proposals which, when coupled with timely approval of a corresponding Section 214 Application seeking authority to provide international services,[5] will facilitate NYNEX's early and effective entry into long distance markets.[6]

Facilities Authorization Therefor, CC Docket No. 79-252 (hereafter "Competitive Carrier Proceeding"), Fourth Report and Order, 95 FCC 2d 554, 574-575 (1983).

3 The procedural history of the Competitive Carrier proceeding is set forth at NPRM ¶ 1, n.4.

4 The Commission has stated that it will consider in its "upcoming interexchange proceeding" whether the separation requirements contained in the NPRM should be continued (NPRM ¶ 11).

5 In the Matter of NYNEX Long Distance Co., Application for Authority Pursuant to § 214 of the Communication Act of 1934, as Amended, to Provide International Services from Certain Parts of the United States to International Points Through Resale of International Switched Services, I-T-C-96-125, filed February 23, 1996, placed on Public Notice on March 1, 1996.

6 As indicated in the NPRM, NYNEX understands the authority at issue herein to include the provision of out-of-region long distance service as a LEC affiliate to wireline and non-affiliated CMRS customers. The authority of BOC-affiliated CMRS providers to offer interexchange long distance services is wholly separate under the 1996 Act.

II. THE COMMISSION SHOULD MOVE QUICKLY TO ENABLE BOC PROVISION OF OUT-OF-REGION LONG DISTANCE SERVICES

A. The Separation Requirements For Independent LEC Long Distance Affiliates Are More Than Adequate For BOC Out-Of-Region Services

The purpose of the NPRM is to "facilitate rapid entry by the BOCs into the provision of out-of-region services" after more than a decade of restraint (NPRM ¶ 14). In doing so the Commission seeks to advance the national telecommunications policy recently embodied in the 1996 Act:

> OUT-OF-REGION SERVICES - A Bell operating company, or any affiliate of that Bell operating company, may provide inter-LATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996. . .(Section 271 (b)(2))

Initially, the Commission proposes to do so on the same bases it applied to all other LECs in the Competitive Carrier proceeding. Specifically, the Commission has long held that an affiliate of a LEC providing domestic interstate, interexchange services qualifies as a "non-dominant" carrier if the affiliate meets certain separation conditions: (1) the affiliate must maintain separate books of account; (2) the affiliate must not jointly own transmission or switching facilities with the LEC; and (3) the affiliate must obtain any of the LEC's local exchange services at tariffed rates and conditions (NPRM ¶ 13).[7] The Commission is correct to conclude that there is no reason why these rules should not apply equally to the BOCs. Indeed, the FCC has

[7] Competitive Carrier proceeding, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984).

itself noted that the MFJ constraints were the only reason that the separations requirements were not earlier applied to the BOCs.[8] The competitive impairment embodied in the MFJ has now been lifted,[9] leaving to the Commission the task of developing a regulatory environment that promotes rapid entry by BOCs into the out-of-region long distance market place.[10]

NYNEX recently filed its Section 214 application for authority to enter the international marketplace under the auspices of a new NYNEX company, the NYNEX Long Distance Company ("NYNEX LD"). NYNEX LD will meet the separation criteria of the Competitive Carrier. NYNEX LD has already been established as a subsidiary of the NYNEX Corporation separate from the NYNEX

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8 Id. These constraints were not promulgated by the Commission and, indeed, have been inconsistent with its procompetitive purposes: "While restrictions on interexchange services offered by the Bell Operating Companies (BOCs) and GTE have developed out of antitrust proceedings, we have not previously prohibited exchange telephone companies from providing interexchange common carrier services . . . ." Fifth Report and Order, 98 FCC 2d at 1197 (footnote omitted).

9 Telecommunications Act of 1996, Section 601(a)(1). Specifically, the Act will release the divested "Bell Operating Companies" from the constraints accepted for them fourteen years ago by AT&T in a Consent Decree (popularly known as the Modification of Final Judgment or "MFJ") to end its then-pending antitrust case. Among those constraints was the prohibition from providing interLATA services, including interstate services of the type at issue here.

10 While the NPRM applies only to BOC out-of-region services, the separation conditions of the Competitive Carrier proceeding apply to LEC in-region (as well as out-of-region) offerings. It is not clear whether the Commission would have found any form of separation necessary for LEC out-of-region services had that question been raised in Competitive Carrier. But certainly the degree of separation appropriate for non-dominant treatment of the long-distance operations of SPRINT, SNET, Rochester Telephone, and other major independent LECs within their local operating areas should be found more than sufficient for a BOC to be classified as non-dominant for its out-of-region services.

LECs, and it will operate in accordance with the three conditions proposed by the Commission in order to qualify for regulatory treatment as a "non-dominant" carrier.

B. Dominant Carrier Regulation of NYNEX LD's Out-of Region Services Would Be Wholly Unnecessary And Anticompetitive

NYNEX LD could not effectively compete if constrained by "dominant carrier" regulations which do not apply to any incumbent carrier. Specifically, if classified a "dominant carrier", NYNEX LD would be required to: (1) obtain prior Commission approval under Section 214 for its use of facilities to provide domestic, interstate, interexchange services; (2) file tariffs announcing its pricing plans upon 14, 45 or 120-day advance notice to its competitors; and (3) disclose detailed cost information about its business to its competitors. In short, it would be delayed in its entry by competitors' regulatory tactics and frustrated in its efforts by the disclosure of its operating plans and marketing strategies to competitors.

In the Competitive Carrier proceeding the Commission has recognized that subjecting non-dominant carriers to such delay and disclosure would not serve the public interest. As a consequence, no prior Section 214 approval is required:

> "Facility decisions by non-dominant carriers cannot be translated into higher prices and cannot make service unavailable. Efficient application of our Section 214 authority does not require circuit-by-circuit analysis of their facilities; in fact, such analysis would be an unnecessary regulatory burden, impair competition, and be contrary to the public interest."[11]

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[11] Fourth Report and Order, 95 FCC 2d at 580.

This ruling was codified in Section 63.07(a) of the Commission's rules.[12]

Similarly, the Commission has found that prior tariff review impedes the public interest in a number of ways, specifically by:

"(1) taking away carriers' ability to make rapid, efficient responses to changes in demand and cost;

(2) impeding and removing incentives for competitive price discounting;

(3) imposing costs on carriers that attempt to make new offerings; and

(4) increasing the costs of the Commission's operations."

As observed by the Commission: "All of these effects can harm consumers through higher prices and services which do not meet their needs."[13]

III. BOC LONG DISTANCE AFFILIATES ARE PROPERLY CLASSIFIED AS NON-DOMINANT CARRIERS

BOC long distance affiliates qualify as non-dominant carriers. A "dominant carrier" is defined as a carrier that possesses "market power" and, conversely, a "non-dominant" carrier is defined as a carrier not found to be dominant (i.e., one that does not possess market power).[14] The Commission has stated that the basic element of market power is "the ability to raise prices by restricting output" (citing Areeda & Turner) or, alternately, "the ability to raise and

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12 Fifth Report and Order, 98 FCC 2d at 1203 and 1210 (Attachment). 47 C.F.R. §63.07(a).

13 Fifth Report and Order, 98 FCC 2d at 1199 n.24 (1984), citing Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 453-55 (1981).

14 AT&T Non-Dominant Order at ¶ 4.

maintain price above the competitive level without driving away so many customers as to make the increase unprofitable" (citing Landes & Posner).[15] It is absolutely clear that these BOC long distance affiliates do not possess market power.

As discussed in the NPRM, the Commission has dealt at length with market power and the proper classification of domestic interstate carriers as "dominant" or "non-dominant" in its Competitive Carrier proceeding. In decisions issued periodically from 1981 to late last year, the Commission dealt with the market power--or dominance--of interstate resellers, then with facility-based carriers (other than AT&T), and finally with AT&T. Over the course of this proceeding every domestic interstate carrier addressed has been ruled non-dominant.

In its most recent Competitive Carrier action, the Commission classified AT&T as "non-dominant" in these same markets. In that analysis, the Commission examined four factors: the carrier's market share, the supply elasticity of the market, the demand elasticity of the customer base, and the carrier's cost structure, size and resources.[16] The application of these factors to BOC long distance affiliates demonstrate that they are "non-dominant".

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15 Fourth Report and Order, 95 FCC 2d at 558 (1983), cited with approval in AT&T Non-Dominant Order, at p. 4.

16 AT&T Non-Dominant Order, at ¶ 38.

First, the Commission points out that the BOC affiliates will be entering these markets with "little or no market share" (NPRM ¶ 8). Although the Commission properly rejected arguments that AT&T's market share was the sole determinant of market power, the absence of BOC market share as they begin to serve these markets is compelling.

Second, the Commission has specifically concluded that there is abundant supply elasticity in these same markets (NPRM ¶ 8). Inasmuch as this was found to be true for AT&T, it is axiomatic that it is also true for the BOC subsidiaries.

Third, the Commission found that both residential and business customers are "highly demand-elastic" in these markets.[17] Here, each prospective long distance customer of the BOC affiliates must demonstrate their individual demand-elasticity to change from an incumbent carrier.

Fourth, the Commission specifically concluded that even AT&T's vast long distance resources do not afford it market power (NPRM ¶ 8). By comparison to the established market positioning of AT&T and numerous other incumbent providers, with billions of dollars in operational long distance investments and financial resources, the BOC affiliates have no long distance operations whatsoever.[18] Finally,

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[17] Id. at ¶¶ 63, 65.

[18] Certainly, the BOC's LEC affiliates have considerable resources and experience in satisfying customer needs, but these are not disproportional to those of many of the interstate incumbent carriers. Further, these resources are neither engaged in, nor designed for interstate service. Proof of this real disparity is evident in the fact that NYNEX LD will enter this market as a switchless reseller of interstate carrier resources already in place (e.g., switches, lines systems).

as the Commission itself suggests (NPRM ¶ 12), whatever concerns it may have about control of local exchange facilities, they are significantly less for BOC out-of-region services than they are for independent LEC in-region services, for which the proposed separate affiliate requirements have been found fully sufficient for non-dominant treatment.

By application of the criteria previously set forth and utilized to determine whether carrier(s) are "non-dominant," the Commission should determine here -- as proposed -- that the long distance affiliates of the BOCs (including NYNEX LD) will be so classified.[19]

IV. NO NEW ACCOUNTING REQUIREMENTS ARE NECESSARY

Finally, the NPRM also points out that the LECs which already provide long distance services through affiliates treat these entities as non-regulated affiliates under the Commission's joint cost rules (47 C.F.R. §§ 64.901 et. seq.) and affiliate transaction rules (47 C.F.R. § 32.27) for exchange carrier accounting purposes (NPRM ¶ 13). Here, again the same rules are appropriate for the BOCs. That is, under the Docket 86-111 joint cost rules, LECs must remove from

[19] In any event, other regulatory tools are available for the Commission's use if necessary (NPRM ¶ 10, n.21). As earlier noted: "non-dominant carriers are required to offer interstate services under rates, terms and conditions that are just, reasonable and not unduly discriminatory (Sections 201-202), and non-dominant carriers are subject to the Commission's complaint process (Sections 206-209). Non-dominant carriers also are required to file tariffs pursuant to our streamlined tariffing procedures (Sections 203, 205) and to give notice prior to discontinuance, reduction or impairment of service." AT&T Non-Dominant Order, at ¶ 13.

regulated revenue requirements the fully allocated costs (and revenues) of nonregulated activities they offer directly.[20] Also under those rules, with respect to affiliate transactions, telephone companies must record services provided to or received from a nonregulated affiliate at tariff rates, prevailing market price or fully allocated cost (in that order, as applicable); moreover, asset transfers are to be recorded (absent a tariff rate or prevailing market price) at net book cost or fair market value, whichever favors the telephone ratepayer.[21] In addition, to these strict rules governing cost allocation and affiliate transactions, the Commission's cost accounting safeguards include: the filing and approval of Cost Allocation Manuals (CAMs); annual cost allocation audits of large telephone companies by independent auditors, and staff review of those audits; reporting of detailed cost data in the ARMIS and staff audits of carriers.[22]

These rules have demonstrated their effectiveness in assuring that nonregulated affiliates are not subsidized and that ratepayers benefit from any joint use of resources. Years of satisfactory regulatory experience with LECs and their long-distance affiliates vastly outweigh any conjecture of potential abuse. The Commission has not had problems applying this regulatory scheme to other LECs

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20 See 47 C.F.R. Sections 32.23, 64.901.

21 47 C.F.R. Section 32.27.

22 Separation of Costs Joint Cost Order, CC Docket No. 86-111, 2 FCC Rcd. 1298 (1987), recon., 2 FCC Rcd. 6283 (1987), further recon., 3 FCC Rcd. 6701 (1988) aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990).

and there is no reasonable basis to erect new and different regulatory restraints here.

V. CONCLUSION

NYNEX appreciates the speed with which the Commission has proceeded herein to facilitate the provision of long distance services by the Bell Operating Companies. Although neither the Commission nor NYNEX consider this procompetitive undertaking complete, prompt classification of BOC long distance affiliates as "non-dominant" in these markets would be an excellent first step. The Commission should adopt the tentative conclusions of the NPRM.

Respectfully submitted,

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